STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon.Kirsten Frank Kelly
Hon. Kathleen Jansen
Hon. Pat M. Donofrio

RALPH ORMSBY and
KIMBERLY ORMSBY,

Plaintiffs-Appellants,

-v-

CAPITAL WELDING, INC., an Ohio corporation, and MONARCH BUILDING SERVICES, INC., an Ohio corporation,

Defendants-Appellees

_____/

Supreme Court
Nos. 123287; 123289

Court of Appeals
No. 233563

Oakland County Circuit
Court No. 98-008608-NO


NEIL A. MILLER (P25645)
**Attorney for Ralph & Kimberly Ormsby**
2301 W. Big Beaver, Ste. 318
Troy, Michigan 48084
(248) 649-0211

MICHAEL M. WACHSBERG (P28646)
**Attorney for Monarch and Rite-Aid**
4057 Pioneer Drive, Ste. 300
Commerce Twp., Michigan 48390
(248) 363-6400

JOSEPH J. WRIGHT (P41289)
**Attorney for Capital Welding**
29777 Telegraph Rd., Ste. 2500
Southfield, Michigan 48034
(248) 827-3834

PATRICK J. BURKETT (P33397)
**Of Counsel for Ralph & Kimberly Ormsby**
2000 Town Center, Ste. 900
Southfield, Michigan 48075
(248) 355-0300


# BRIEF ON APPEAL - APPELLANT

## ORAL ARGUMENT REQUESTED


Submitted by:
RUTLEDGE, MANION, RABAUT,
TERRY & THOMAS, P.C.
By: Joseph J. Wright (P41289)
**Attorney for Defendant-Appellant**
**Capital Welding, Inc.**
29777 Telegraph Rd., Ste. 2500
Southfield, Michigan 48034
(248) 827-3834

ATTORNEYS AND COUNSELORS
4000 PENOBSCOT BUILDING
DETROIT, MICHIGAN 48226
(313) 965-6100

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## STATEMENT OF THE QUESTIONS PRESENTED

WHETHER THE RULES REGARDING LIABILITY FOR INJURIES TO AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR ARE APPLIED DIFFERENTLY DEPENDING ON THE ROLE OF THE PARTY FROM WHOM RECOVERY IS SOUGHT

Defendant-Appellant answers "yes"

Plaintiff-Appellee answers "no"

The Circuit Court did not directly address this issue

The Court of Appeals answers "no"

WHETHER THE RETAINED CONTROL DOCTRINE CAN BE APPLIED TO A FELLOW SUBCONTRACTOR WHERE THE ALLEGED "CONTROL" CONSISTS OF A SINGLE, ISOLATED PRESCRIPTION FOR ALTERATION OR DEVIATION UNRELATED TO THE INCIDENT

Defendant-Appellant answers "no"

Plaintiff-Appellee answers "yes"

The Circuit Court answers "no"

The Court of Appeals answers "yes"

WHETHER THE UNFINISHED STEEL STRUCTURE UPON WHICH PLAINTIFF WAS WORKING AT THE TIME OF THE INCIDENT, SEPARATE FROM OTHER TRADES, REPRESENTS A "COMMON WORK AREA" UNDER FUNK

Defendant-Appellant answers "no"

Plaintiff-Appellee answers "yes"

The Circuit Court answers "no"

The Court of Appeals answers "yes"

WHETHER AN INDEPENDENT AVENUE OF RECOVERY EXISTS IN FAVOR OF AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR AGAINST A FELLOW SUBCONTRACTOR UNDER THE COMMON WORK AREA PRINCIPLE OUTLINED IN FUNK

Defendant-appellant answers "no"

Plaintiff-Appellee answers "yes"

The Circuit Court answers "no"

The Court of Appeals answers "yes"

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## STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

Pursuant to MCR 7.301(A)(2) and MCR 7.302(G)(3), this Court has granted Defendant-Appellant leave to appeal from the January 24, 2003, published decision of the Court of Appeals. Leave to appeal was granted in this Court's order dated 11/6/03.

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## INTRODUCTION

The matter before this Court concerns the potential liability of land owners, lessees, general contractors, and other subcontractors for injuries incurred by employees of independent contractors working under them. This issue, first given detailed examination by this Court in Funk v. General Motors Corp., 392 Mich 91; 220 N.W.2d 641 (1974), has had a long history of disparate and, at times, confusing treatment by the courts of this State. The published opinion of the Court of Appeals in this matter is the latest, and in many respects is the most confusing manifestation of this inconsistent treatment. This Court should, in taking this matter up, reexamine not only the present shape of the law in this area, but the reasons for imposing such rules in the first place.

In defiance of policy, precedent and the clear mandate of Funk, the Court of Appeals in Ormsby v Capital Welding, Inc., 255 Mich App 165; 660 N.W.2d 730 (2003), held, that the "retained control" and "common work area doctrines" are two separate and distinct tests that must be applied to every landowner, general contractor and sub-contractor from whom an injured worker employed by a subordinate subcontractor seeks compensation. Unlike the Court of Appeals analysis in Ormsby, supra, an examination of the policy reasons behind Supreme Court precedent suggests that these rules are not applied in the same manner to all parties.

Contrary to the vague and unrestricted holding of the published Court of Appeals opinion, Appellant contends that retained control liability is specifically limited to those situations where the employer of an independent contractor actively assumes the unique duties of a general contractor. Likewise, it is clear that the "common work

area" exception to the general rule of non-liability was formulated with general contractors in mind, not land owners or other employers of independent contractors such as Capital.

In this matter, Plaintiff-Appellee, Ralph Ormsby, a skilled union iron worker and foreman on the job at the time of his injury, voluntarily and without instruction from anyone other than his employer (an independent contractor), improperly knocked down a portion of a single-story structure upon which he was working.

No evidence was presented in the lower court suggesting that the collapse of the structure was caused by either a defect in the steel provided by Capital or any direction or instruction provided by Capital. That aside, the Court of Appeals erroneously relied upon a single event occurring on the job site wherein an employee of Capital and Ormsby himself discussed the on-site fabrication of angle iron to correct an isolated and irrelevant misfabrication in materials delivered to the site as proof that Defendant-Appellant "retained control" over the work. This is in error as Michigan case law certainly stands for the proposition that more is required.

The Court of Appeals also erroneously held that Plaintiff was injured in what is alleged to be a "common work area" rendering Defendant-Appellant Capital independently liable on that basis. This is false because Plaintiff was not injured in a common work area. Moreover, assuming Plaintiff was injured in a common work area, that determination does not give rise to an independent basis for subjecting Capital, a

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fellow subcontractor who was not acting in the capacity of a general contractor, to liability herein.[1]

## STATEMENT OF FACTS

### A. THE PARTIES

i. **Plaintiff-Appellant Ralph Ormsby** (hereinafter referred to as "Ormsby"): A fifteen-year member of Local No. 25 at the time of the incident, Ormsby was employed as an iron worker by Abray Steel Erectors. Based on both his prior work experience and reputation with that company, Ormsby was selected and in fact discharging his duties as a foreman on the job at the time of his injury. (Appendix - pp. 10a-11a).

ii. **Kimberly Ormsby**: Ralph Ormsby's wife, Kimberly, seeks damages in the nature of loss of consortium.

iii. **Rite-Aid of Michigan** (hereinafter referred to as "Rite-Aid"): The project owner, Rite-Aid had contracted for the construction of the subject drug store at the intersection of Maple and Coolidge in the City of Troy.

iv. **Monarch Building Services** (hereinafter referred to as "Monarch"): The general contractor hired by Rite-Aid, Monarch oversaw construction of the project and hired the various subcontractors, including Capital Welding, necessary to complete the project.

v. **Capital Welding, Inc.:** An Ohio-based broker and erector of structural steel, Capital was hired by Monarch to both provide and erect the structural steel which would ultimately make up the super structure of the subject Rite-Aid drug store.

vi. **Abray Steel Erectors [a MCR 2.112(K) non-party]** (hereinafter referred to as "Abray"): Capital subcontracted with Abray Steel Erectors, Plaintiff's employer, to perform the erection of the structural steel delivered to the project by Capital Welding. The Capital/Abray

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[1] This Court has held that in cases where a subcontractor does not function in the capacity of a general contractor and does not, for example, exercise control over another subcontractor's work or over a common work area, the exception recognized in Funk does not apply. Hardy v Monsanto Enviro-Chem Systems, 414 Mich 29, 69 n41; 323 N.W.2d 270 (1982).



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subcontract, which was memorialized by purchase order, was made with the full knowledge and consent of the general contractor, Monarch, as well as the project owner, Rite-Aid. (See, Purchase Order, Appendix- p. 470a; see also, Appendix - pp. 197a-198a, 203a-204a).

**B. THE PROJECT**

Described in deposition as a "cookie-cutter" type of building, the subject Rite-Aid was essentially a standard single-story steel framed structure, typical in nearly all respects to Rite-Aid stores throughout the State of Michigan. (Appendix- p. 316).

On or about 4/22/98, Capital delivered by common carrier the structural steel which would ultimately be used to frame both the Rite-Aid store and an identical adjacent structure variously referred to as the "leased portion" of the premises. (Appendix - p. 318). The only Capital employee then on site was Alex Stadler who left the following afternoon after inventorying the delivery. (Appendix - p. 319a). In fact, other than Mr. Stadler's supervision of the steel delivery to the site, Capital had no presence on the job site until the day after the incident. (Appendix - p. 330a).

After delivery, employees of Abray, including Ormsby, at their own direction, began the process of erecting the structural steel. (See, Ormsby dep., Appendix- pp. 34a-35a). This preliminary erection involved setting the columns, securing the tie joists which comprised the structure's perimeter, and setting the bar joists, which would ultimately serve as the structure's roof framing. Essentially, the preliminary erection serves the purpose of getting the iron in the air, thereby allowing the iron workers to proceed to the "detail phase" of the job, which consists of plumbing and welding the joists and columns, and ultimately sheathing the structure's roof. (Appendix - pp. 395a-

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396a). Importantly, all overhead lifting was accomplished by Abray employees utilizing a crane owned and operated by Abray. (See, Abray dep., Appendix - p. 386a).

Contrary to acknowledged industry standards, safe work practices, and the unambiguous warning labels attached to the structural steel provided by Capital, Abray employees, including the Plaintiff, loaded numerous 6,000-pound bundles of roof decking, roof frames and trusses atop the unbolted, unsecured joists on *both* the Rite-Aid and leased portion of the premises. (See, Vulcraft Warning Tag, Appendix - p. 476a; see also, Ormsby dep., Appendix - pp. 34a-35a). Importantly, the structure was so "loaded" *before* columns had been plumbed, the bar joists had been welded, and/or the detail work had been commenced. (See, Ormsby dep., Appendix - pp. 41a-45a).

At the time of the incident, the project was proceeding well ahead of schedule.

## C. THE INCIDENT

On or about 4/24/98, the day after he oversaw the preliminary set-up of the structural steel on the leased portion of the premises (which he admitted was set up in a fashion "essentially identical" to the Rite-Aid side), Plaintiff Ormsby began the detail work on the Rite-Aid side of the building. (Appendix - pp. 41a-45a). Well aware that "decking was loaded on top of the joists on both sides of the building" and acknowledging that those joists had yet to be welded, Ormsby and a co-worker set about the task of spacing or straightening the joists. (Appendix - pp. 41a-45a). Ormsby testified that the process of spacing or straightening joists is accomplished by hitting the joists themselves with a sledge hammer or "beater." (See, Ormsby dep., Appendix - pp. 45a-47a).

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Immediately prior to the incident, Ormsby recalled twice striking a joist that had "bundles of deck on it." (Appendix - pp. 46a-47a). Apparently believing that the joist he had struck did not move, Ormsby turned around atop the roof deck bundle upon which he was standing and the unsecured structure collapsed. (Appendix - p. 47a).

**D. CLAIMS AGAINST CAPITAL WELDING, INC.**

At the trial court, Plaintiffs' allegations against Capital Welding were three-fold. First, Plaintiffs claim that the structural steel provided by Capital was defective in that certain columns arrived on-site without lugs and/or bolt holes. Second, Plaintiffs allege Capital was negligent in hiring his employer, Abray Steel Erectors. Third, Plaintiffs argue that iron work is inherently dangerous and that Capital had retained control over the work that Plaintiff Ormsby was performing at the time of his injury such that Capital cannot, as a matter of law, delegate the responsibility of safety to Ormsby's employer, Abray Steel.

Pursuant to a Motion for Summary Disposition filed by Capital Welding on 2/22/00, the trial court granted summary disposition to Capital on 9/19/00.[1] (9/19/00 Opinion and Order, Appendix - pp. 547a-550a). On 3/16/01, the trial court granted Monarch's motion filed pursuant to MCR 2.116(c)(10), relying upon the language and authority in its earlier Opinion and Order. (3/16/01 Opinion and Order, Appendix - p. 553a). On 3/26/01, Plaintiffs filed their Claim of Appeal.

On 1/24/03, the Court of Appeals issued its opinion, designated by the Court as "for publication," pursuant to MCR 7.215, reversing in part and affirming in part the

[1]Rehearing was denied by the trial court on 11/7/00. (Appendix - p. 551a).



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decisions of the trial court. (Court of Appeals Opinion, Appendix - pp. 555a-569a). Appellant filed its Application for Leave to Appeal on 3/3/03. This Court granted the Application by Order dated 11/6/03.

## STANDARD OF REVIEW

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. Mate v Wolverine Mutual Ins. Co., 233 Mich App 14, 18; 592 N.W.2d 379 (1998). Panich v Iron Wood Products Corp, 179 Mich App 136, 139; 445 N.W.2d 795 (1989). On appeal, the Court will review *de novo* the lower court's decision whether to grant or deny summary disposition. Pinckney Community Schools v Continental Casualty Co, 213 Mich App 521, 525; 540 N.W.2d 748 (1995).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Neubacher v Globe Furniture Rentals, 205 Mich App 418, 420; 522 N.W.2d 335 (1994). Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. McCart v J. Walter Thompson, 437 Mich 109, 115; 469 N.W.2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. McCormic v Auto Club Ins Ass'n, 202 Mich App 233, 237; 507 N.W.2d 741 (1993).

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## ARGUMENT

### I. THE RULES REGARDING LIABILITY FOR INJURIES TO AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR ARE APPLIED DIFFERENTLY DEPENDING ON THE ROLE OF THE PARTY FROM WHOM RECOVERY IS SOUGHT.

As a general rule, an employer of an independent contractor is not liable for the contractor's negligence or the negligence of its employees. Bosak v Hutchinson, 422 Mich 712, 724; 375 N.W.2d 333 (1985). However, an exception to the general rule exists where the work performed by the contractor is inherently dangerous. Funk v General Motors Corp., 392 Mich 91, 107; 220 N.W.2d 641 (1974). Another recognized exception exists were the land owner or employer of an independent contractor retains control of the work performed by the subcontractor. Funk, 392 Mich at 101.

#### A. Origins of "Retained Control"

The seminal Michigan case interpreting the doctrine of "retained control" as a basis for establishing direct liability of employers of independent contractors is Funk v. General Motors Corp., 392 Mich 91; 220 N.W.2d 641 (1974). The case involved an owner (GM), an architect, a general contractor, a subcontractor, and an injured worker (Funk). Funk, an employee of the subcontractor, was injured when he fell while working on a new construction project at GM. After receiving worker's compensation from the subcontractor, Funk brought a third-party liability suit against both GM and the general contractor alleging that they owed him a duty to insure that the workers on the project used adequate safety equipment to protect against falls. 392 Mich at 99-101. This Court affirmed a verdict against the general contractor on the ground that, in

certain circumstances, a general contractor is responsible for the safety of its subcontractor's employees. 392 Mich at 104. The Funk court also held that the owner, GM, could be held liable because, through the supervision over the project by its architect, it "retained and exercised sufficient control so that it ought to be held responsible for its own negligence in failing to implement reasonable safety precautions by the general contractor and subcontractor." 392 Mich at 108.

In the Funk opinion, the Court set forth the policy reasons behind the general rule of non-liability for one who hires an independent contractor:

> The real question in all independent contractor cases is whether a man may 'farm out' or 'lop off' some of his affairs and escape liabilities in connection with them. No general policy forbids this. 'There seems to be no compelling reason * * * why a lawyer should have to repair his own shoes, or fill his own teeth,' or incur liability to outsiders for harm caused by the cobbler or the dentist in doing these things for him." 392 Mich at 102 n2, quoting 2 Harper & James, The Law of Torts, § 26.11, p 1400.

After noting that accidents are common features of construction sites, and that mere owners would not ordinarily be held liable for accidents, the court stated that, as to the owner of the property, General Motors:

> General Motors is subject to liability because a jury could properly conclude that General Motors, despite its designation as owner, retained and exercised sufficient control so that it ought to be held responsible for its own negligence in failing to implement reasonable safety precautions by the general contractor and subcontractor. 392 Mich at 108.

The Court made special note that General Motors had acted in a "superintending capacity" over the job site. Indeed, GM's exercise of "an unusually high degree of control over the construction project" was the root of its liability. 392 Mich at 106.

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**B. Origins of "Common Work Area"**

A second prong of the Funk analysis involved what has become known as the common work area exception to the general rule of non-liability. In taking note of the potential liability of Darin & Armstrong, the general contractor, the Funk court held that:

> "[A]s a practical matter in many cases only the general contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors. * * * [I]t must be recognized that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so." Alber v Owens, 66 Cal 2d 790; 59 Cal Rptr 117, 121-122; 427 P2d 781 (1967).
>
> We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen. 392 Mich at 104.

Eventually, the Supreme Court would create a more definite four point test for measuring the common work area doctrine. In Groncki v. Detroit Edison Co, 453 Mich. 644; 557 N.W.2d 289 (1996), the Court held in order to impose liability on a general contractor there must be: (1) a general contractor with supervisory and coordinating authority over the job site, (2) a common work area shared by the employees of several subcontractors, and (3) a readily observable, avoidable danger in that work area (4) that creates a high risk to a significant number of workers. 453 Mich. at 662.

In fashioning the ruling in Funk, Justice Levin outlines two basic positions: one for owners/employers of independent contractors and another for general contractors. Because the general contractor, by reason of its supervisory and coordinating authority,

assumes responsibility for those areas of the job site where several trades will ultimately work, its liability would be controlled by the "common work area" test. The owner, not having any implied duty in regard to the job site, would only be liable if it voluntarily and actively assumed the unique duties of the general contractor.

**C. Evolution of the Rules in Plummer**

Refinement of this policy continued in this Court's decision in Plummer v. Bechtel Construction Co., 440 Mich. 646; 489 N.W.2d 66 (1992). In Plummer, plaintiff, a pipe fitter involved in constructing a power plant, filed an action against defendants, the general contractor and the power company, to recover damages for injuries he sustained when he fell from an unprotected scaffold while working. The Court first concluded that the owner, Edison, retained control over the project because it, "exercised an unusually high degree of control over the construction project from its very inception." 440 Mich at 659. After this, the Court went on to determine the liability of Bechtel, the general contractor. 440 Mich at 666. It is noteworthy that in both Funk and Plummer, the Court does not consider the question of whether or not the general contractor retained control of the jobsite. In both of these cases, there appears to have been no factual dispute as to the duty and actual degree of control over the job exercised by Darin & Armstrong (in Funk) and Bechtel (in Plummer).

The Court in Plummer explicitly adopted Section 414 of the Restatement 2d of Torts. The Court then cited Duplantis v Shell Offshore, Inc, 948 F2d 187, 193 (CA 5, 1991) and Lewis v Riebe Enterprises, Inc, 170 Ariz 384, 390; 825 P2d 5 (1992), for the proposition that an owner and/or general contractor had to take direct operational

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control as a prerequisite for the imposition of liability. In Lewis, the Supreme Court of Arizona addressed the contention that comment (c) means that "a general contractor is subject to liability under § 414 only if it retains control over the subcontractor's method of doing the details of the work." 440 Mich at 662. It should be noted that this reference to the application of the retained control test to a general contractor is not found in Funk and represents a change in the rule established therein.

Echoing this Court's analysis in Funk, the Plummer court reiterated the policy behind the "common work area" formulation, stating that, "[t]he common work area formulation sought to distinguish between a case where it was appropriate to impose overall safety responsibility on the general contractor and one where it would not be appropriate."440 Mich at 660.

In sum, an examination of Funk and Plummer yields two conclusions. First, the potential liability of an owner or an employer of an independent contractor was to be gauged by examining whether or not it had retained control over the work. That consideration alone would determine the potential liability of the owner or employer of an independent contractor. However, in contrast to Funk, it would appear from the opinion in Plummer that, as to the general contractor, retained control and common work area were to be a single liability test with two distinct elements, both of which had to be met.

**D. Evolution of the Funk doctrine in the Court of Appeals**

From these cases, the Court of Appeals has, with varying success, tried to apply a consistent test to determine the liability of owners and general contractors. The Court

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in Ormsby, correctly noted that "with respect to the retained control and common work area exceptions, this Court has applied them as two separate exceptions, but also, as one single exception." Ormsby v. Capital Welding, Inc., 255 Mich 165,175; 660 N.W.2d 730 (2003).

In Erickson v. Pure Oil Corp., 72 Mich. App. 330; 249 N.W.2d 411 (1976), it is clear that the court follows Plummer in regarding "common work area" and "retained control" as a single test with regard to general contractor liability. In doing so, the Court referred to Funk, stating,

> The frequently recurring use of the phrase "common work area" in Funk suggests that the Supreme Court desired to limit the scope of a general contractor's supervisory duties and liability for injuries which occur in "common work areas". 72 Mich App at 336.

In Samhoun v Greenfield Const Co, Inc, 163 Mich. App. 34; 413 N.W.2d 723 (1987), the Court first discusses the general considerations of retained control and then applies the common work area formulation. As noted by the Court in Ormsby it does so as part of a unitary one-step test.

In Butler v Ramco-Gershenson, Inc., 214 Mich App 521; 542 N.W.2d 912 (1995), the Court refers to the liability of the owner/employer of an independent contractor, stating that,

> As a general rule, an owner of property is not liable to an employee of an independent contractor for negligence. Funk v General Motors Corp, 392 Mich. 91, 101; 220 N.W.2d 641 (1974) [overruled in part on another ground Hardy v Monsanto Enviro-Chem Systems, Inc, 414 Mich. 29; 323 N.W.2d 270 (1982)]; Wolfe v Detroit Edison Co, 156 Mich. App. 626, 627; 402 N.W.2d 16 (1986), lv den 428 Mich. 865 (1987). In such situations, the actual employer of a worker is immediately responsible for job safety and for maintaining a safe work place. Funk, supra, p 102. The two main exceptions to this general rule provide for

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liability if: (1) the property owner retains control over the work done and the contractor's activities or (2) the work is inherently dangerous--the work can reasonably be foreseen as dangerous to third parties. Bosak v Hutchinson, 422 Mich. 712, 724; 375 N.W.2d 333 (1985). See also, Samodai v. Chrysler Corporation, 178 Mich App 252; 443 N.W.2d 391 (1989); Perry v. McLouth Steel Corp., 154 Mich App 284; 397 N.W.2d 284 (1986).

None of these courts mention common work areas as a second source of potential liability to be applied to all parties regardless of their status on the job site. In fact, most Court of Appeals precedent in this area either applies the retained control doctrine without separate mention of the "common work area" exception, or states affirmatively that there are but two exceptions to the rule of non-liability, **(1) retained control and (2) inherently dangerous activity.** See also, Reeves v. K-Mart Corp., 229 Mich App 466; 582 N.W.2d 841 (1998); Wolfe v. Detroit Edison Co., 156 Mich App 626; 402 N.W.2d 16 (1986); Miller v Great Lakes Steel Corp, 112 Mich App 122, 125; 315 NW2d 558 (1982); Maki v. Copper Range, 121 Mich App 518; 328 N.W.2d 430 (1982); Thon v. Saginaw Paint Manufacturing, 120 Mich App 745; 327 N.W.2d 551 (1982), Locke v. Mach, 115 Mich App 191; 320 N.W.2d 70 (1982); Caldwell v. Cleveland-Cliffs Iron Co., 111 Mich App 721; 315 N.W.2d 186 (1981); Dowell v. General Telephone Co. of Mich., 85 Mich App 84; 270 N.W.2d 711 (1978).

**E. The Candelaria Formulation of the Rules**

The Ormsby court pays special attention to the case of Candelaria v BC General Contractors, Inc., 236 Mich App 67; 600 N.W.2d 348 (1999), stating, "[w]e believe there has been some confusion regarding the analysis and language used in Candelaria."

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In Candelaria, defendant Horizon, a cable television provider, hired defendant BC as an independent contractor to install cable t.v. service in certain areas of Ingham County. BC in turn hired Bob Rego, also an independent contractor, to perform a portion of the work involving aerial construction. Plaintiff's decedent, Thomas Candelaria, was an employee of Bob Rego. Candelaria was killed on the job while laying cable wire across a roadway. Apparently, a passing automobile snagged a portion of that cable which had become elevated from the roadway, causing the nearby wire reel to jerk forward, fatally striking Candelaria. It is undisputed that Candelaria and the Bob Rego foreman were the only employees on site on the day of the accident. Candelaria's estate brought suit against BC claiming that it could be held liable in negligence on the basis of its retention of control over the work performed by his employer, Bob Rego. The Court of Appeals disagreed and reversed the trial court's denial of BC's directed verdict motion, concluding that BC did not retain and exercise sufficient control over Rego's work to be held liable.

In ruling against plaintiff, the Court of Appeals stated that:

> The doctrine of retained control applies only in those situations involving "common work areas." Plummer, 440 Mich. at 666-668 (Levin, J.), 669 (Boyle, J.); see also Groncki v Detroit Edison Co, 453 Mich. 644, 662; 557 N.W.2d 289 (1996) (Brickley, C.J.); Hughes v PMG Building, Inc, 227 Mich. App. 1, 5-6; 574 N.W.2d 691 (1997); Samhoun, 163 Mich. App. at 45-46; Erickson v Pure Oil Corp , 72 Mich. App. 330, 336; 249 N.W.2d 411 (1976). Candelaria, 236 Mich App at 74-5.

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## F. The Need for the Reversal of the Ormsby Decision

Today, nearly 30 years after this Court's decision in Funk, several formulations of the rules governing the potential liability of those who employ independent contractors exist. Under the original rule in Funk, the liability of an owner or the employer of an independent contractor was gauged solely by the retained control test, while the liability of the general contractor was gauged by the common work area test. Under the rule of Plummer, the liability of an owner or employer of an independent contractor was again gauged solely by the retained control test and the liability of the general contractor gauged by a unified retained control and common work area test. The rule that subsequently developed in Candelaria employed a unified retained control and common work area test and appeared to apply it to both the owner/employer of the independent contractor *and* the general contractor. Finally, we have the newly developed "clarified" rule enunciated in Ormsby where each and every party, regardless of status, is put through a separate retained control and common work area test. Unlike Candelaria, Ormsby appears to regard each test as a source of liability.

The rule now enunciated in Ormsby departs from the original logic behind Funk and Plummer. There is no logical reason to apply the common work area standard outside the context of general contractor liability. Either the owner has usurped the function of the general contractor, in which case the retained control test will result in the owner's liability, or the general contractor will have failed to protect workers under its control in the common work area. In that latter case, a court will determine if the injured worker was under the control of the general contractor ("retained control") and

whether the worker was in the general contractor's sphere of influence ("common work area").

It is an important public policy that responsibility for safety be more clearly defined on construction sites and other job sites. Clear designation of primary responsibility for safety on job sites enhances public safety and public welfare. By holding general contractors responsible for overall job safety on job sites, the original Funk rule makes this bright line designation. Any rule which would muddy this important designation should be disfavored, as it would lead to uncertainty and the possibility that no one person or persons would be responsible for worker safety, thus increasing the risk of accidents.

Since the decision in Plummer, this Court intended that the retained control and common work area tests be applied to general contractors as a single unified test. Most panels of the Court of Appeals have also interpreted the law in this manner. By historically framing the rule in this way, the Court has preserved the general policy surrounding the role of independent contractors as truly independent (i.e. the general rule that one who hires an independent contractor and stays out of the way should not be held liable for the contractor's errors), while at the same time recognizing that the general contractor has a layer or zone of responsibility for what goes on in the common work area.

Once these principles have been defined, it is also clear that the potential liability of a subcontractor, such as Defendant-Appellant Capital, can be no greater, and

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should indeed be much less, than the general contractor.[2] Under the principles outlined above, the potential liability of Capital would be similar to that of an owner (i.e. to be imposed only if its retention of control had some actual effect on the manner or environment in which the work was performed. See, Candelaria, 236 Mich. App. at 76.) Unlike the holding of the court in Ormsby, the common work area doctrine should not be applied to a mere employer of a subcontractor such as Capital Welding. The doctrine should only be applied to a general contractor.

To the extent that the Ormsby court would seek to impose a higher or varying standard, this Court should reverse it and re-establish a simplified and more definite rule to this area of law. Accordingly, this Court should reverse the holding of the Court of Appeals and uphold the ruling of the trial court in this matter.

## II. THE RETAINED CONTROL DOCTRINE DOES NOT APPLY WHERE THE ALLEGED "CONTROL" CONSISTS OF A SINGLE, ISOLATED PRESCRIPTION FOR ALTERATION OR DEVIATION UNRELATED TO THE INCIDENT

In assessing what constitutes the requisite level of control sufficient to impose liability under the theory of retained control, the Michigan Supreme Court has adopted 2 Restatement 2d of Torts, § 414. See Plummer v Bechtel Constr. Co., 440 Mich 646; 489 N.W.2d 66 (1992). Comment (c) to § 414 provides:

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[2] The Michigan Manufacturer's Association has filed a brief in this matter as Amicus Curiae in which it gives a history of the rules regarding master/servant and independent contractor relationships. The MMA argues, as does this brief, that an owner should only be held liable for injuries to employees of subcontractors if it, by its conduct, assumes the duties of a general contractor. Defendant-Appellee Capital joins in this position and incorporates the MMA's previously filed brief by reference as if fully set forth herein.



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> ... the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to ***prescribe alterations and deviations***. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way. 2 Restatement 2d of Torts, § 414, Comment (c), cited at 440 Mich at 660. (Emphasis added)

In its decision in Ormsby, the Court states correctly that:

> A general contractor must exercise a "high degree of actual control" to be liable under this theory; general oversight or monitoring is insufficient. Phillips [v Mazda Motor Mfg (USA) Corp, 204 Mich. App. 401, 408; 516 N.W.2d 502 (1994)]; see also Burger v Midland Cogeneration Venture, 202 Mich. App. 310, 317; 507 N.W.2d 827 (1993); Samodai v Chrysler Corp, 178 Mich. App. 252, 256; 443 N.W.2d 391 (1989). Ormsby, 225 Mich App at 185.

The Court of Appeals continues:

> Although formulations such as 'high degree of actual control' and 'dominant role' suggest a fact-specific inquiry, one clear rule can be gleaned from Funk and its progeny. At a minimum, for an owner or general contractor to be held directly liable in negligence, its retention of control must have had some actual effect on the manner or environment in which the work was performed. Ormsby, 255 Mich App at 183, quoting Candelaria v BC General Contractors, 236 Mich App 67, 76 (1999).

These decisions, which emphasize the words "actual control," demonstrate that a Court, in applying this doctrine, must look at the totality of the circumstances to determine the actual situation on the job in question. The test is therefore objective, not subjective. In other words, the court can not simply rely on any one party's subjective view of circumstances surrounding the job, but must look at the **actual influence** each

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contractor and/or the owner had over the job and the **actual responsibilities** assumed by each contractor and/or landowner.

It is undisputed that at or around the time the Perry Drug Store chain was purchased by Rite-Aid, a policy was implemented by Rite-Aid that all future Rite-Aids would be constructed by local union personnel. (Appendix - p. 142a). It is also undisputed that the general contractor, Monarch, was both aware of this policy and aware that Capital was a non-union shop in advance of entering into the instant subcontract. (Appendix - pp. 196a-197a). Likewise, there is no dispute that Monarch was aware that Capital would have to subcontract out the erection portion of the project in order to comply with Rite-Aid policy, and in fact had acquiesced to Capital's selection of Abray as the union erector to perform that aspect of the job. (Appendix - pp.203a-204a).

During his deposition, Donald Abray, the owner of Abray Steel Erectors made the following admissions:

Q. You were hired by Capital Welding, correct?

A. Yes.

Q. Did you bring any documents with you today?

A. The only thing I have is a purchase order .... (Appendix - p. 375a).

* * *

Q. And that purchase order agrees or reflects and memorializes a promise to pay $23,500 to Abray Steel in connection with this particular project?

A. Yes. (Appendix - p. 376a)

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While it is undisputed that no written subcontract outlines Abray's responsibilities on the job, there is no legitimate dispute that Abray knew and understood that it had assumed total responsibility for the manner and method in which the Rite-Aid store would be erected. Again, the testimony of Abray is instructive:

Q. In broad brush strokes, what is the chain of command, if you will, at your company?

A. Primarily myself giving instructions to the foremen, foremen giving instructions to the workers.

Q. What is the role of a foreman at Abray Steel Erectors?

A. To oversee the job and tell all the workers what to do basically.

Q. Do foremen at Abray Steel erectors have the primary responsibility, if you will, for administering and assuring that safe work practices are employed at Abray work sites?

A. Yes. (Appendix - pp. 374a-375a)

* * *

Q. Let's take this particular incident for example, the Rite-Aid project. I believe the testimony in this case has reflected that Mr. Ormsby, Ralph Ormsby, was in fact one of the foremen from Abray Steel erectors on the site at the time of his injury?

A. Yes.

Q. How is it that you selected Mr. Ormsby to fulfill that role as job site foreman?

A. He had been with me I'm not quite sure how long. I really don't remember how long he was with me, but he had been a foreman on other projects with me and I liked his work. (Appendix - pp. 376a-377a).

* * *

Q. Fair enough. I just wanted to make sure that I was on the same page. Did you have any discussion at all with Capital, H.E. Robinson or representatives of Capital that would relate to the manner and method in which this particular structure was to be erected?

A. I don't believe so. (Appendix - p. 390a)

* * *

Q. Did you expect that Capital would be present on the site to supervise Abray employees during the erection of this particular structure?

A. No, I did not expect that.

Q. Did you expect that your foremen would be principally responsible for supervising the other Abray ironworkers in the manner and method in which the structure was to be erected?

A. Yes. (Appendix - pp. 390a-391a)

* * *

Q. Whose decision would it have been to load unwelded bar joists with roof deck bundles and other supplies for the completion of this structure prior to those bar joists being welded or permanently attached to a tie joist?

A. The erection foreman. (Appendix - pp. 397a-398a)

* * *

Q. Did you ever have any contact or conversation with Capital Welding at all that you recall which dealt with the manner and method in which you, Abray Steel, planned on erecting this particular structure?

A. No.

Q. How about Monarch? Same question with regard to Monarch.

A. No, I don't recall.

Q. That decision you felt was ultimately Abray's to make?

A. Yes. (Appendix - p. 399a)

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* * *

Q. Just to recap. I want to make certain that this is clear. You were not instructed by Capital or Monarch in a manner in which this particular structure was to be erected, that's true, isn't it?

A. I don't recall any instructions.

Q. You didn't look to Capital or Monarch, you Abray, for such instruction, did you?

A. No.

Q. You didn't expect that Monarch or Capital for that matter would provide supervision or instruction and safe ironwork practices for Abray or its employees, did you?

A. No.

Q. In fact, you testified that the persons or person primarily responsible for that, at least on-site, are Abray foremen, correct?

A. Yes. (Appendix - p. 408a)

In this case, the Ormsby court completely disregards the admissions of Plaintiff's employer, Don Abray, as well as its own statements on the law of retained control by making the subjective pronouncements of Ralph Ormsby the lynchpin of its decision. The Ormsby court states that:

> Plaintiff testified that his supervisor did not instruct him on solving this problem. Rather, Stadler, Capital's project manager, gave plaintiff a piece of angle iron "and said, I want you to fabricate the lugs out of this and weld them on the columns so that the columns can be made to go plumb." Plaintiff further testified, "if the superintendent on the job tells you they want something done, then you're pretty much obligated to do that really." 255 Mich App at 186.

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It is on this that the Court of Appeals based its entire decision as to retained control. By basing its decision solely upon Plaintiff's subjective perceptions, the Court of Appeals ignores a host of other evidence as to the actual situation regarding Capital's actual control over the job.

The Court of Appeals, in addition to improperly focusing on the subjective perceptions of Plaintiff, altogether misconstrues the basic facts underlying its analysis. A portion of the Court of Appeals' statement of Basic Facts and Procedural History should be considered:

> Plaintiff testified that the joists supplied for the job were not manufactured to be bolted, something he had not seen before. Alex Stadler, an employee of Capital and the site's project manager, instructed plaintiff to fabricate lugs from angle iron to weld to the columns as a substitute. ***At some point during the execution of this task***, plaintiff stood on a bundle of decking that had been loaded onto the joists. As he stood on the decking, he prepared the joists for welding by spacing them. As he attempted to space a joist by hitting it with a sledgehammer, the joists and decking on which he stood shifted, causing him to fall and sustain injuries. 255 Mich App at 169-170. (Emphasis added).

While this summation of relevant fact by the Court of Appeals misconstrues Ormsby's testimony regarding the necessity for fabricating lugs in the first place, the primary error lies in the conclusion that he was injured during the execution of that task. The record is abundantly clear that Ormsby, if he was directly involved in the task at all, had completed it the day before the incident and was involved in work wholly unrelated to any delegation by Capital at the time of his injury. (See, Ormsby dep., Appendix - pp. 34a-47a).

Moreover, in footnote 3 of its Opinion, the Court of Appeals erroneously concludes:

> On appeal, plaintiff contends that he fell from joists and decking that were stacked by another crew. However, his deposition testimony indicates that another crew landed the joists and stacked the decking on the other side of the building, but that plaintiff landed the joists and stacked the decking on the side where he was working and from which he fell. 255 Mich App at 169 n3.

As the testimony of Ormsby himself makes clear, this conclusion is likewise erroneous. In fact, Ormsby's testimony is unequivocal in demonstrating that the portion of the building that he fell from on the day of the incident had already been erected by another crew when he arrived for his first day on the job. (Appendix - pp. 33a-35a).

These errors of fact clearly lead the Court of Appeals to incorrectly hold that Capital's representative's "... direction to plaintiff had an actual effect on the manner in which plaintiff performed his job." Ormsby, 255 Mich App at 183.

Regardless of the fact that the Ormsby court's decision as to retained control is based only upon the subjective opinion of Plaintiff Ralph Ormsby, the incident described by Ormsby and relied upon by the Court is: (1) a single isolated incident insufficient to support a finding of retained control; and (2) unrelated to the injury suffered by Plaintiff.

It is uncontroverted that Alex Stadler was the only person that Capital Welding had on the job site at any time prior to Ormsby's injury. (Appendix - p. 330a). Stadler was Capital's project manager for the Rite-Aid job. Monarch's project supervisor, Larry Mendenhall, testified that Monarch did not expect Stadler, or any other Capital

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employee, to remain on site after Capital had finished unloading and inventorying the steel it had delivered. (Appendix - p. 197a). Moreover, Plaintiff's employer admitted that he never expected that Capital would provide any coordination or supervision of Plaintiff or the other iron workers. (Appendix - pp. 390a-391a, 399a, 408a). In fact, there is no legitimate dispute that Stadler was even on the job site when Ormsby was injured. (Appendix - pp. 318a-319a, 330a).

Stadler's testimony is clear that he and Ormsby discussed an isolated and irrelevant misfabrication in materials delivered to the site and they "both agreed that it needed a clip angle". (Appendix - p. 327a). Stadler explained:

> Q. And you instructed Abray Steel on the methods of correcting the misfabrication?
>
> A. We both agreed that it needed a clip angle.
>
> Q. Right.
>
> A. A joist seat, whatever you want to call it.
>
> Q. You couldn't put the joist up without the clip angle?
>
> A. That's correct. So then we looked to see what it required. We had the material on site and so, yes, it was agreed between the two of us that if there's too much downtime, Capital Welding would pay them one man hour, whatever it took to put the joist seat [clip angle] on. (Appendix - p. 327a).

There was and is no factual basis for Ormsby to allege that Capital "retained control" over the Rite-Aid job. Likewise, there is no evidence that Ormsby was ordered or otherwise compelled to accept Stadler's suggestions regarding on-site fabrication. The record is clear that both discussed the situation and mutually agreed to implement

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Stadler's recommendation. In fact, Stadler's suggestion is precisely the type of alteration or deviation which the Restatement tells us is insufficient to maintain liability under a retained control theory. This is certainly not the type of "control" observed in cases such as Funk and Plummer, supra.

It should also be noted that the angle-iron fabrication cited by the Court of Appeals had nothing to with Plaintiff's injury. The record clearly shows that Plaintiff was injured the day after he finished fabricating the angle iron and installing it on the columns. (Appendix - p. 39a). Moreover, according to Ormsby's testimony, the column he allegedly modified with the angle iron would have been incorporated into the leased site of the premises, as the Rite-Aid side of the premises, from which he ultimately fell, had already been erected by another Abray foreman before Ormsby's first day on the job. (Appendix - p. 32a-33a). Indeed, as Ormsby admits, he was involved in spacing joists at the time of his injury, a task wholly unrelated to the fabrication of lugs.

In Candelaria, supra, the court, citing the seminal cases dealing with the doctrine of retained control, explains:

> There is no specific test to determine the degree of control specific to create an independent duty of care in an owner or general contractor under the doctrine of retained control, and the descriptions are somewhat varied. See, Phillips v Mazda, 204 Mich App 401, 408 (1994) ("There must be a high degree of actual control, general oversight or monitoring is insufficient"); ... Miller v. Great Lakes Steel, 112 Mich App 122, 127 (1982) (Explaining that some "sort of substantive control must be maintained by the owner over the contractor's work in order to render the owner liable for an injury to a contractor's employee"); Erickson v Pure Oil Corp., 72 Mich App 330, 339 (1976) (Holding that an owner's mere retention of a contractual right to terminate employment of those not in compliance with its rules and regulations was not sufficient.) Candelaria, 236 Mich App at 75, 76.

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Recognizing that formulations such as "high degree of actual control" and "dominant role" imply a fact specific inquiry, the Candelaria court concludes that a clear rule can in fact be gleaned from these seminal cases:

> At minimum, for an owner or general contractor to be held directly liable in negligence, its retention of control must have had some actual effect on the manner or environment in which the work was performed. Candelaria, 236 Mich App at 76.

In Funk and Plummer, supra, the two leading cases from this Court, retained control consisted of a pervasive presence and widespread and superintending powers by the parties in question. This contrasts sharply with the case at hand, wherein the so-called "control" consists of a single isolated incident involving an employee of Capital, Alex Stadler. The record is absolutely barren of even a suggestion that Ormsby was involved in fabricating any lugs at the time of his injury, or that either the absence or fabrication of lugs on site was in any manner causally related to Mr. Ormsby's fall. The Court of Appeals' choice to make this isolated contact the centerpiece of its retained control analysis defies not only common sense, but the prior holdings of this Court.

As has been stated, retained control must be measured by what actually occurs on the job site and the contacts must be extensive. As is set forth in the Restatement 2d of Torts, "[i]t is not enough that he [the owner/employer of the contractor] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations." 2 Restatement 2d of Torts, § 414,

Comment (c), cited in Plummer, supra, 440 Mich at 660. If Plummer and Funk suggest anything, it is that the control exercised by the contractors' employer be substantial.

The Ormsby court ignores this important consideration and sets the bar so low that the retained control exception threatens to render the general rule of non-liability a nullity. This Court should reverse the decision of the Court of Appeals and restore the law regarding retained control to its proper place.

## III. THE UNFINISHED STEEL STRUCTURE UPON WHICH PLAINTIFF WAS WORKING, SEPARATE FROM OTHER TRADES, DOES NOT REPRESENT A "COMMON WORK AREA" UNDER FUNK

In presenting this argument, Capital in no way concedes the doctrine applies to subcontractors like Capital. Indeed, Capital maintains the term "common work area" applies only to claims against the general contractor.

In defining a "common work area" the Candelaria court, citing as an example Hughes v PMG Building, Inc., 227 Mich App 1, 6; 574 N.W.2d 691 (1997), explained:

> In order to have a "common work area" there need not be multiple subcontractors working on the same site at the same time. All that is required is that the employees of two or more subcontractors eventually work in the same area. Candelaria, 236 Mich App at 75. (Emphasis added)

Recognizing the general rule that a general contractor is not liable for a subcontractor's negligence, the Hughes court explains:

> ... a general contractor may be held liable if it failed to take "reasonable steps within its supervisory or coordinating authority" to guard against "readily observable, avoidable dangers which create a high degree of risk to a significant number of workmen." Hughes, 227 Mich App at 5, citing Funk, 392 Mich at 104.

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The case of Pinkowski v Adena Corporation, No. 199525; 2000 U.S. Dist. LEXIS 17245 (ED Mich, Nov. 7, 2000) and in particular its analysis of Hughes, is of special interest. (Exhibit 1 - Pinkowski Opinion). Plaintiff Pinkowski, an employee of Wanko Electric, an electrical subcontractor, sued defendant Adena Corporation for injuries he suffered while working on a construction job site owned by AIG Baker. Adena was the general contractor on the site. Adena moved for summary judgment on the grounds that, *inter alia,* there was not a readily observable avoidable danger *in a common work area.*

In Pinkowski, plaintiff argues that because there were several carpenters working in the pharmacy area on the day of the accident, he was working in a common area. Adena does not dispute that other subcontractors were working in the pharmacy area. Rather, it argues that there is no evidence that an employee of any other trade would be working in the ceiling area of the pharmacy where plaintiff was working at the time of his injury. In support of its argument for a more precise parameter definition, Adena relies upon Hughes v PMG Building, Inc., 227 Mich App 1; 547 N.W.2d 691 (1997). Citing Hughes, the Pinkowski court notes:

> In Hughes, the plaintiff, a roofing contractor, was injured as he began to shingle a small porch overhang, which pulled away from the house and collapsed without warning. The court of appeals rejected plaintiff's argument that because a carpenter contractor assembled the porch, and another contractor would later be pouring cement for the porch support stanchions, the porch overhang was a common area. Id. at 6-7. Noting that there was no evidence that any employee of another trade would be working on top of the porch overhang, the court of appeals held that the porch overhang was not a common area. Id. The court of appeals reasoned:

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> If the top of the overhang or even the overhang in its entirety were considered to be a "common work area" for purposes of subjecting the general contractor to liability for injuries incurred by employees of subcontractors, then virtually no place or object located on the construction premises could be considered not to be a common work area. We do not believe that this is the result the Supreme Court intended. Pinkowski, Slip Op. at 9-11.

The Pinkowski court went on to hold that:

> The reasoning of the court of appeals in Hughes is persuasive. Pinkowski's characterization of the relevant area as the entire pharmacy area is over broad; the danger to which Pinkowski was exposed was contained entirely within the soffit area above the ceiling of the pharmacy. This was a location separate and away from the areas that other subcontractors were working. Indeed, like in Hughes, Pinkowski has proffered no evidence to indicate that any other trade would be working in the ceiling area of the pharmacy. As such, the area where Pinkowski was working cannot be considered a common area. Pinkowski, Slip Op. at 11-12.

In the Court of Appeals, Ormsby cited the testimony of Mendenhall stating that, although only Abray people were erecting steel at the time of the accident, the building site would be occupied by other subcontractors at a later time. (Appendix - p. 182a-186a). This Court must keep in mind that Plaintiff Ormsby fell while working on unsheathed overhead steel joists. It is uncontroverted that the only workers, and indeed the only trade, that would ever work on or "around the building when the steel is going up" were iron workers, like Ormsby. (See, Redding dep., Appendix - p. 263a). As in Hughes and Pinkowski, the area of potential danger to which Ormsby was exposed was the unsheathed steel beams upon which he was working. This area is, without question, "a location separate and away" from the area where other subcontractors were working.

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In determining that the area where Plaintiff's injury occurred was a common work area, the Ormsby court, in apparent contravention of Hughes, gravitated toward

> work or provide expensive safety features that protect employees of many or all of the subcontractors." Funk, 392 Mich at 104.

This, as must be conceded, is the origin of the common work area element of the Funk doctrine. As can be seen, it was meant to apply to general contractors and only to general contractors. There is no policy reason (or logical reason) to apply it to a subcontractor, because the general contractor is responsible for safety on the job site, and as Funk makes clear, this duty is non-delegable. In fact, the court in Funk specifically points out that this principle is not to be applied to an owner who can not be expected, as a matter of course, to supervise construction safety. Nor, as this court notes, "would this analysis be applicable where the employee of a sub-contractor seeks to recover from another subcontractor." 392 Mich at 105 n6.

Properly recognizing Capital's status as a subcontractor, the trial court properly granted summary disposition to Capital. Testimony clearly established that Rite-Aid was the owner and Monarch was the general contractor on the construction project. Further, documentary evidence and deposition testimony establish that Capital and Abray were both subcontractors.

The Court in Ormsby suggests that Capital, a subcontractor, can be held liable under the common work area principle. This clearly conflicts with both the legal principles and policy statements set forth in Plummer and Funk. Plummer, supra, at 660; Funk, supra, at 104. The Court of Appeals should not be permitted to so extend this doctrine. Accordingly, this Court should reverse the decision of the Court of Appeals and prevent the unwarranted extension of this prong of the Funk doctrine.

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## CONCLUSION

For the reasons stated above, this Court should reverse Section IV, A and B of the 1/24/03 Opinion of the Court of Appeals and reinstate the 9/19/00 Order of the Oakland County Circuit Court.

Respectfully submitted,

RUTLEDGE, MANION, RABAUT,
TERRY & THOMAS, P.C.

By: _____

JOSEPH J. WRIGHT (P41289)
**Attorney for Defendant-Appellant**
**Capital Welding, Inc.**
29777 Telegraph Rd., Ste. 2500
Southfield, Michigan 48034
(248) 827-3834

Date: December 18, 2003

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PETER PINKOWSKI, Plaintiff, v. ADENA CORPORATION, Defendant.
Case No. 99-73247

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OFMICHIGAN, SOUTHERN DIVISION

2000 U.S. Dist. LEXIS 17245

November 7, 2000, Decided
November 7, 2000, Filed

DISPOSITION: [*1] Adena's motion for summary judgment GRANTED and case DISMISSED.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant general contractor moved for summary judgment of plaintiff subcontractor employee's claim arising from injuries suffered while installing light fixtures.

OVERVIEW: Plaintiff suffered severe electrical injuries while installing lights as an employee of subcontractor. Plaintiff filed suit against defendant general contractor, and defendant moved for summary judgment. The court granted defendant's motion, holding that defendant general contractor did not retain control over the plaintiff; the presence of the live wire which caused plaintiff's injuries was not a readily observable avoidable danger in a common work area; and the activity plaintiff was engaged in at the time of the accident--installing light fixtures--was not inherently dangerous. As such, defendant was not responsible to plaintiff for his injuries.

OUTCOME: Motion for summary judgment granted, because defendant general contractor was not responsible for plaintiff's injuries, as plaintiff did not retain control, there was no readily observable danger in a common area, and the work to be done was not inherently dangerous.

CORE TERMS: general contractor, subcontractor, electrical, electric, common area, observable, pharmacy, inherently dangerous, electrician, overhang, porch, contractor, electricity, ceiling, significant number, scaffolding, retention, hanging, steel, summary judgment, deposition, avoidable, switch, general rule, safeguards, forklift, cable, entitled to summary judgment, independent contractor, distribution system

CORE CONCEPTS -

Civil Procedure: Summary Judgment: Summary Judgment Standard
Summary judgment is appropriate when the moving party demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). There is no genuine issue of material fact when the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. The court must decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. The court must view the evidence in the light most favorable to the non-moving party.

Torts: Vicarious Liability: Independent Contractors
The general rule is that when a general contractor hires an independent subcontractor to perform a job, the general contractor is not responsible for injuries caused by, or to, an employee of the subcontractor. An exception to the general rule exists, however, when the general contractor retains and exercises control sufficient to create a corresponding duty to implement reasonable safety precautions.

Torts: Vicarious Liability: Independent Contractors
There is no specific test or guidelines for determining if a general contractor has retained control; it is a fact specific inquiry. However, precedents emphasize that the general contractor must retain at least partial control and direction of actual construction work, which is not equivalent to safety inspections and general oversight.

Torts: Vicarious Liability: Independent Contractors
Independent from the amount of control that a general contractor retains or exercises on a subcontractor's work, the general contractor is still responsible to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workers. Each of the three elements, (1) readily observable, avoidable danger, (2) common work area, and (3) high degree of risk to a significant number of workers, must be met for liability to attach.

Torts: Vicarious Liability: Independent Contractors
To qualify as a common area, all that is required is that two or more subcontractors will eventually work in the same area of the construction site.

Torts: Vicarious Liability: Independent Contractors
An exception to the general rule that a general contractor is not liable for an independent contractors' negligence is when the activity done by the independent contractor is inherently dangerous. Inherently dangerous speaks to work which, although not highly dangerous, involves a risk recognizable in advance that danger inherent in the work itself, or in the prescribed way of doing it, may cause harm to others. Liability under this theory, however, may be only be imposed when the work contracted for is likely to create a peculiar risk of physical harm, or if the work involves a special danger inherent in, or normal to the work that the employer reasonably should have known about, or contemplated, at the inception of the contract.

COUNSEL: For PETER PINKOWSKI, plaintiff: Mark R. Mueller, Mihelich & Kavanaugh, Joseph E. Mihelich, Eastpointe, MI.

For ADENA CORPORATION, defendant: Donald C. Brownell, Vandeveer Garzia, Detroit, MI.

For ADENA CORPORATION, defendant: Simeon R. Orlowski, Kohl, Secrest, Mount Clemens, MI.

JUDGES: AVERN COHN, UNITED STATES DISTRICT JUDGE.

OPINIONBY: AVERN COHN

OPINION: MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

A.

This is a tort case. Plaintiff Peter Pinkowski (Pinkowski), an employee of Wanko Electric (Wanko), an electrical subcontractor, is suing defendant Adena Corporation (Adena) n1 for injuries he suffered while working on a construction job site owned by AIG Baker; Adena was the general contractor on the site. Before the Court is Adena's motion for summary judgment on the grounds that (1) it did not retain control over Wanko, (2) there was not a readily observable avoidable danger in a common work area, and (3) the activity Pinkowski was engaged in at the time of the accident was not inherently dangerous.

n1 The case was originally brought against Adena and AIG Baker. AIG Baker was dismissed pursuant to a grant of summary judgment on August 14, 2000.

[*2]

B.

A hearing on Adena's motion was held on August 2, 2000, at which time the Court stated that the record was bare as to certain evidence pertaining to the electrical distribution system in the building under construction, and in particular, who had control over the main electrical switch for the building. The Court requested supplemental papers and continued the motion for 60 days. Adena has since filed the papers requested; the motion is ripe for decision.

For the reasons that follow, the motion will be granted.

II. Background

The following facts are undisputed. On November 30, 1998, Pinkowski was working for Wanko as an electrician. n2 Wanko had been hired as a subcontractor by Adena, the general contractor, for the construction of a new Wal-Mart store owned by AIG Baker. James Kerster (Kerster), Wanko's foreman, directed Pinkowski to affix light fixtures to an electric line in the soffit area above the ceiling in the pharmacy area of the store. Although no one actually saw the accident and Pinkowski has no recollection of what happened, it appears that when he was hooking up the lights, Pinkowski came into contact with a live, or energized, wire and suffered severe electrical[*3] injuries. Although Kerster knew that the line was live when he directed Pinkowski to install the fixtures, he failed to tell Pinkowski.

n2 It is unclear if Pinkowski was a certified electrician or an apprentice electrician.

III. Summary Judgment

Summary judgment is appropriate when the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). There is no genuine issue of material fact when "the

record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *In re Dollar Corp., 25 F.3d 1320, 1323 (6th Cir. 1994)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)).*[*4] The Court "must view the evidence in the light most favorable to the non-moving party." *Employers Ins. of Wausau v. Petroleum Specialties, Inc., 69 F.3d 98, 101 (6th Cir. 1995).*

IV. Analysis

A. Retained Control

The general rule is that when a general contractor hires an independent subcontractor to perform a job, the general contractor is not responsible for injuries caused by, or to, an employee of the subcontractor. *Funk v. General Motors, 392 Mich. 91, 220 N.W.2d 641 (1974); Candelaria v. B.C. General Contractors, Inc., 236 Mich. App. 67, 72, 600 N.W.2d 348 (1999) ; Samhoun v. Greenfield Construction Co., 163 Mich. App. 34, 45, 413 N.W.2d 723 (1987).* An exception to the general rule exists, however, when the general contractor retains and exercises control sufficient to create a corresponding duty to implement reasonable safety precautions *Funk, supra at 108; Plummer v. Bechtel Construction Co., 440 Mich. 646, 489 N.W.2d 66 (1992).*

There is no specific test or guidelines for determining if a general contractor has "retained control;" it is a fact specific inquiry. *Wolfe v. Detroit Edison, 156 Mich. App. 626, 631, 402 N.W.2d 16 (1986).*[*5] However, precedents emphasize that the general contractor must "retain at least partial control and direction of actual construction work, which is not equivalent to safety inspections and general oversight." *Samodai v. Chrysler Corp., 178 Mich. App. 252, 256, 443 N.W.2d 391 (1989);* see also *Candelaria, supra, at 76* (stating that the "retention of control must have had some actual effect on the manner or environment in which the work was performed.")

1.

In his brief, Pinkowski spends a significant amount of time discussing Adena's conduct with respect to Wanko and the overall job site to illustrate Adena's retention and exercise of control over Wanko's work. Reviewing the extensive list of activities by Adena, it appears that the conduct cited by Pinkowski falls within the categories of safety inspections and general oversight. For example, Pinkowski says that Adena's supervisor, Michael Hall, "monitored and inspected the subcontractor's performance," and "conferred with [Kerster] on a daily basis." Even assuming such conduct to be true, those activities do not describe a retention or exercise of control and direction of Wankos' actual construction[*6] work by Adena. See Samodai.

More importantly, all the evidence in the record indicates that control over the source of the electricity in the line, i.e., the main switch, or disconnect switch housed in the back electric room, rested solely with Wanko through Kerster. See Kerster deposition at pp. 5-6, 7, 9, 11, 22, 26, 28-29, 31. Kerster unequivocally testified that he was responsible for "throwing" the lights on or off; if a Wanko electrician needed the electricity disconnected to work on an electric line, he or she needed to alert Kerster.

Here, it is undisputed that Pinkowski's injuries resulted from the fact that the electric line he was working on was energized. Conversely, Pinkowski would not have been injured if the electric line had been disconnected. Therefore, as the Court indicated at the motion hearing, it is simply not enough that the general contractor had control over the site, if control of the electrical distribution system rested in the subcontractor. It would be unreasonable to require a general contractor, as a rule, to "stand guard," so to speak, over the electrical switch.

Given that there is no evidence in the record that Adena retained any control [*7] over the electrical distribution system in the building at the time of Pinkowski's accident, such that it created a corresponding duty to implement reasonable safety precautions, Adena is entitled to summary judgment on the issue of retention of control.

B. Common Area

Independent from the amount of control that a general contractor retains or exercises on a subcontractor's work, the general contractor is still responsible to "guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workers." *Funk, supra, at 104.* Each of the three elements, (1) readily observable, avoidable danger, (2) common work area, and (3) high degree of risk to a significant number of workers, must be met for liability to attach. *Samhoun v. Greenfield Co., 163 Mich. App. 34, 46, 413 N.W.2d 723 (1987).*

1.

The danger to which Pinkowski was exposed was that the electric line he was working on was live. Neither party seems to dispute that this was an avoidable danger, in that the electricity in the line could have been disconnected prior to Pinkowski working on it. Thus the issue is whether it was readily[*8] observable.

Pinkowski argues that since the lights in the pharmacy were on, a condition that was obvious to everyone in the area, the danger of Pinkowski working on a live wire was also readily observable. Thr argument is not well taken. Lights, even in the same area, can be connected to different circuits. Simply because the area was illuminated does not mean that it was readily observable that the particular line Pinkowski worked on was necessarily energized. Merely looking at a line will not reveal whether the line is activated or deactivated. Compare with *Funk, supra, at 103* (holding danger readily observable where plaintiff, an iron worker, fell from a six-inch steel beam hanging 30 feet in the air and "it was obvious to even the most casual observer that the men in the steel were without safety harnesses or belts and there was no safety net under the men.")

Moreover, Pinkowski's reliance on the testimony of two construction safety experts, A. David Brayton and Matthew Balmer, is misplaced. Their testimony merely indicates that the danger was readily observable by electrical experts. However, Adena's foreman was not an electrician, nor is it claimed that he [*9]should have been. In Justus v. Swope, the court of appeals, stated: "It is not reasonable. . . to expect a mere homeowner to be cognizant of. . .the special dangers or peculiar risks to employees of an independent contractor where. . . the independent contractor and his employees are more knowledgeable. . . ." Although the court in its statement was discussing the issue of inherent dangerousness, and a general contractor is far more knowledgeable than a mere homeowner, the point is still a cogent one. Here, Pinkowski, a professional electrician with at least one year's experience in the field failed to observe that the electrical line was live before he touched it. It is unreasonable to assume then, that it was readily observable to a non-electrical professional. Accordingly, the danger of a live electric line was not readily observable.

2.

Even assuming arguendo that the danger to Pinkowski was readily observable, Pinkowski was not working in a common area.

a.

To qualify as a common area, "all that is required is that two or more subcontractors will eventually work in the same area of the construction site." *Erickson v. Pure Oil Corp., 72 Mich. App. 330, 337, 249 N.W.2d 411 (1976);* [*10]*Johnson v. Turner Construction Co., 198 Mich. App. 478, 481, 499 N.W.2d 27 (1993)* (citing Erickson). Pinkowski argues that because there were several carpenters working in the pharmacy area on the day of the accident, he was working in a common area.

Adena does not dispute that other subcontractors were working in the pharmacy area. Rather, it argues that there is no evidence that an employee of any other trade would be working in the ceiling area of the pharmacy. In support of its argument for a more precise parameter definition. Adena relies upon *Hughes v. PMG Building, Inc., 227 Mich. App. 1, 574 N.W.2d 691 (1997),* appeal filed.

In Hughes, the plaintiff, a roofing contractor, was injured as he began to shingle a small porch overhang, which pulled away from the house and collapsed without warning. The court of appeals rejected plaintiff's argument that because a carpenter contractor assembled the porch, and another contractor would later be pouring cement for the porch support stanchions, the porch overhang was a common area. *Id. at 6-7.* Noting that there was no evidence that any employee of another trade would[*11] be working on top of the porch overhang, the court of appeals held that the porch overhang was not a common area. Id. The court of appeals reasoned:

If the top of the overhang or even the overhang in its entirety were considered to be a "common work area" for purposes of subjecting the general contractor to liability for injuries incurred by employees of subcontractors, then virtually no place or object located on the construction premises could be considered not to be a common work area. We do not believe that this is the result the Supreme Court intended.

*Id. at 8.*

b.

The reasoning of the court of appeals in Hughes is persuasive. Pinkowski's characterization of the relevant area as the entire pharmacy area is overbroad; the danger to which Pinkowski was exposed was contained entirely within the soffit area above the ceiling of the pharmacy. This was a location separate and away from the areas that other subcontractors were working. Indeed, like in Hughes, Pinkowski has proffered no evidence to indicate that any other trade would be working in the ceiling area of the pharmacy. As such, the area where Pinkowski was working cannot be[*12] considered a common area.

3.

For the same reasons that the area in which Pinkowski was working does not qualify as a common area, it also cannot be said that the live electric line in the ceiling of the pharmacy created "a significant risk to a number of workers." *Funk, supra, at 104.* Nothing in the record indicates that any worker other than Pinkowski faced the same danger which injured him. This is in sharp contrast to *Erickson v. Pure Oil Co., 72 Mich. App. 330, 249 N.W.2d 411 (1976)* (common area found), where the plaintiff fell from a roof used by numerous subcontractors, and *Plummer v. Bechtel Construction Co., 440 Mich. 646, 489 N.W.2d 66 (1992)* (common area found), where the plaintiff fell from a work platform regularly used by the 2500 workers. See also, *Hughes, 227 Mich. App. at 7-8* (holding that four workers does not constitute a significant number of workers). As such, there was no danger to a significant number of workers.

In short, Pinkowski's situation does not fall within the common work area doctrine imposing liability on the general contractor. Adena is therefore entitled to summary judgment on the issue[*13] of common area liability.

C. Inherently Dangerous

1.

Another exception to the general rule that a general contractor is not liable for an independent contractors' negligence is when the activity done by the independent contractor is inherently dangerous. *Bosak v. Hutchinson, 422 Mich. 712, 375 N.W.2d 333 (1985).* Inherently dangerous speaks to "work which, although not highly dangerous, involves a risk recognizable in advance that danger inherent in the work itself, or in the . . . prescribed way of doing it, may cause harm to others." *Id. at 729* (quoting 2 Restatement of Torts, 2d, § 427, comment c.) Liability under this theory, however, may be only be imposed when the work contracted for is likely to create a "peculiar risk" of physical harm, or if the work involves a "special danger" inherent in, or normal to the work that the employer reasonably should have known about, or contemplated, at the inception of the contract. *Id. at 727-28* (citing 2 Restatement of Torts, 2d, §§ 416, 427).

2.

In arguing that the work he was doing at the time of his accident was inherently dangerous, Pinkowski offers ample evidence indicating that[*14] working on a live line cannot be done safely, and that someone such as himself, with only one year of electrical apprentice experience, should not be working on a live line. See deposition of Leon Moeller at 48-51, deposition of Kerster at 84-85, deposition of Steven Markesino at 47-48; see also, *Schultz v. Consumers Power, 443 Mich. 445, 506 N.W.2d 175 (1993)* (stating "electrical energy possesses inherently dangerous properties. . . .")

Pinkowski's argument, however, misses the mark. At the time of his accident, Pinkowski was attaching a light fixture to an electric line. According to Kerster, Pinkowski's foreman, this was fairly routine work. The danger was only created by doing the job without disconnecting the line first.

In *Samodai v. Chrysler Corp, supra,* the plaintiff was injured when he was standing on a rigged-up platform on the prongs of an elevated forklift in order to change some lightbulbs suspended twenty feet in the air. As the plaintiff was being lowered, the forklift lifting mechanism malfunctioned and caused him to fall. The court of appeals determined that the plaintiff was not engaged in an inherently dangerous activity at[*15] the time of the accident because neither changing lightbulbs, nor operating a forklift, in themselves, present a peculiar risk or special danger. *178 Mich. App. at 255.*

In *Justus v. Swope, 184 Mich. App. 91, 96, 457 N.W.2d 103 (1990),* the court of appeals again reiterated that "the risk involved in the activity must be. . . inherent in the work itself, or normally to be expected in the ordinary course of the usual or prescribed way of doing it." For example, in *Rasmussen v. Louisville Ladder Co., 211 Mich. App. 541, 536 N.W.2d 221 (1995),* the plaintiffs, two ironworkers, were using hanging scaffolding to assist them in bolting metal siding to the fame of a building they were constructing. Rather than using metal safety cables, the workers substituted hemp rope for the missing steel cable. The plaintiffs were injured when the rope snapped, and the scaffolding collapsed. The court of appeals held:

the dangerous activity undertaken was the decision to forgo the use of steel safety cables, not the use of hanging scaffolding. The activity recognized by defendant to be performed by plaintiffs involved the fairly routine task of constructing[*16] a multistory building using hanging scaffolding. Reasonable safeguards against the injury were expected to be used.

*Id. at 549.*

Likewise, here, the dangerous activity was attaching a light fixture to an electric line without deactivating it; attaching a light fixture to an electric line in and of itself is not dangerous. Pinkowski is a professional electrician

and it is reasonable to expected him to exercise reasonable safeguards. To adopt Pinkowski's argument would be to hold that any activity involving electricity is inherently dangerous, thus making a general contractor or owner liable for acts of the electrical contractor, or subcontractor, on every construction job, or in every situation where electricity is involved.

Moreover, there is no evidence that at the time the contract was entered into between Wanko and Adena, that any of the parties contemplated, or should have known that someone was going to work on an electric line without first deactivating it. Wanko is an experienced professional electrical contractor and can be expected to exercise reasonable safeguards. Accordingly, Adena is entitled to summary judgment on the issue of inherent dangerousness. [*17]

V. Conclusion

For the reasons stated above, Adena's motion is GRANTED and the case is DISMISSED.

SO ORDERED.

AVERN COHN

UNITED STATES DISTRICT JUDGE

Dated: NOV 07 2000

Detroit, Michigan